

THE BEFORE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

TOWARD RESPONSIBLE DEVELOPMENT,  
et al.,

Petitioners,

v.

CITY OF BLACK DIAMOND,

Respondent,

And

BD LAWSON PARTNERS, LP and BD  
VILLAGE PARTNERS, LP,<sup>1</sup>

Intervenors.

Case No. 10-3-0014

**ORDER ON  
MOTION FOR INVALIDITY BASED ON  
NEW INFORMATION**

THIS Matter comes before the Board<sup>2</sup> upon Petitioner Toward Responsible Development's Motion for Order of Invalidity Based on New Information.<sup>3</sup> The City of Black Diamond and Intervenor YarrowBay filed responses objecting to Petitioners' motion.<sup>4</sup> Petitioners filed a reply.<sup>5</sup>

<sup>1</sup> Intervenors are collectively referred to as YarrowBay.

<sup>2</sup> Former Presiding Officer David Earling resigned from the Board on May 23, 2011. The Governor has not yet appointed a replacement. The panel hearing this matter is Presiding Officer Margaret Pageler and Board member Raymond Paoletta.

<sup>3</sup> Filed June 2, 2011, with Declaration of Robert Edelman.

<sup>4</sup> Black Diamond's Response to TRD's Motion for Order of Invalidity Based on Alleged New Information, June 9, 2011; Intervenors' Response to Petitioners' Motion for Order of Invalidity and attached Declaration of Andrew S. Lane in Support of Intervenors' Response to Petitioners' Motion for Order of Invalidity, June 9, 2011.

<sup>5</sup> Reply in Support of Petitioners' Motion for Order of Invalidity, and Supplemental Declaration of Robert Edelman, June 16, 2011.

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2 **I. BACKGROUND**

3 Petitioners filed a Petition for Review with the Board seeking review of the City of Black  
4 Diamond's approval of two master planned developments (MPDs) – Lawson Hills and The  
5 Villages - asserting various violations of the Growth Management Act, RCW 36.70A (GMA),  
6 and the State Environmental Policy Act, RCW 43.21C (SEPA).<sup>6</sup>  
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8 On February 15, 2011, the Board issued its Order on Motions addressing dispositive  
9 motions filed by Petitioners, Black Diamond, and YarrowBay. With this Order, the Board  
10 determined not only that it had jurisdiction to hear the appeal but that Black Diamond had  
11 violated the GMA's requirements for public participation. The matter was remanded for  
12 compliance with the GMA's public participation process but the Board declined to issue a  
13 determination of invalidity, choosing to set an expedited schedule (10 weeks) for Black  
14 Diamond's compliance.<sup>7</sup>  
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17 Petitioners sought reconsideration as to invalidity, which the Board denied.<sup>8</sup> The City of  
18 Black Diamond requested an extension of the compliance schedule due to scheduling  
19 conflicts of staff and Planning Commissioners. The Board granted an additional 30 days, but  
20 not the full 180-days requested by the City.<sup>9</sup>  
21

22 Subsequent appeals to the court followed. First, YarrowBay sought review of the Board's  
23 February 15 Order on Motions before the King County Superior Court, Cause 11-2-07352-1  
24 KNT, on the jurisdictional issues. On April 8, 2011, the Court issued an Order Granting Stay  
25 of Compliance Schedule and specifically stated that the stay was effective "pending the  
26 outcome of this appeal of the Board's February 15, 2011 decision."<sup>10</sup> On April 21, 2011, the  
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29 <sup>6</sup> Filed November 19, 2010.

30 <sup>7</sup> Order on Motions, issued February 15, 2011.

31 <sup>8</sup> Order Denying Motion for Reconsideration, March 17, 2011.

32 <sup>9</sup> Order on Limited Extension of Time Regarding City of Black Diamond's Motion to Extend Time to Complete Compliance Schedule, March 24, 2011.

<sup>10</sup> Court Order, at 2

1 Board granted Petitioners' request for a Certificate of Appealability based on the  
2 jurisdictional rulings in the Board's Order on Motions. The matter is now pending before the  
3 Court of Appeals, Division I, Docket 67095-6.

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5 Second, Petitioners sought review before Thurston County Superior Court, Cause 11-2-  
6 00884-1, of the Board's denial of invalidity in both the February 15 Order and the March 17  
7 Order on Reconsideration. This matter, upon a motion by YarrowBay, has been removed to  
8 King County Superior Court, Cause 11-2-17444-1 SEA. On May 17, 2011, the Board  
9 denied Petitioners' request for a Certificate of Appealability based on the Board's denial of  
10 invalidity as set forth in the February 15 Order on Motions and March 17 Order on  
11 Reconsideration. On June 14, 2011, the King County Superior Court, on motion of  
12 YarrowBay, stayed its consideration of the denial of invalidity pending the outcome of  
13 appeals on the jurisdictional question.  
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## 15 16 **II. DISCUSSION AND ANALYSIS**

17 On June 2, 2011, Petitioners filed a motion seeking the imposition of invalidity based on  
18 new information.<sup>11</sup> With this motion, Petitioners argue two new circumstances warrant an  
19 invalidity ruling:  
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- 21 • The Superior Court's stay of compliance and the parties' agreement to seek direct  
22 appellate review substantially lengthen the time during which the Yarrow Bay  
23 proposal may vest, compared to the four-month compliance schedule imposed by the  
24 Board in its Order on Motions.
- 25 • The City is considering approval of two development agreements that would vest  
26 significantly more of the proposed development than the two subdivisions assumed  
27 by the Board in its Order on Motions.

28 The Board recognizes that the time-line for Black Diamond's compliance has greatly  
29 increased due to the court appeals. The Board's Order on Motions set the date for the  
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32 <sup>11</sup> While the Board's Rules of Procedure allow a motion for reconsideration, the Rules expressly prohibit a  
motion for reconsideration of a Board order on reconsideration. WAC 242-02-832(3). As indicated above, a  
majority of the Panel has previously denied Petitioners' motion for reconsideration as to invalidity.

1 compliance hearing on May 24, 2011, contemplating a prompt resolution of the threshold  
2 public process deficiencies. The pendency of the various court appeals and the Superior  
3 Court's stay of compliance proceedings extends the time for compliance, substantially  
4 increasing the likelihood of development vesting that may frustrate GMA planning goals.<sup>12</sup>  
5 Submittals of the parties in connection with the pending motion indicate that while the court  
6 challenges are pending, YarrowBay is likely to or has already applied for up to 1,129  
7 dwelling units (of the total 6,050 planned) and all of the proposed commercial  
8 development.<sup>13</sup>  
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10  
11 The Board notes Judge Carey's Order Granting Stay of Compliance Schedule is limited to  
12 staying the "compliance schedule issued by the GMHB, including the schedule requiring  
13 compliance by May 27, 2011 (as set by the GMHB in its March 24, 2011 Order)...."<sup>14</sup> The  
14 Judge stayed the Board's March 24 Order on Limited Extension of Time and the compliance  
15 schedule contained in the order. There is no stay directed more generally at the Board's  
16 other authorized activities. While compliance schedules and invalidity are both components  
17 of GMA compliance, the statutory authority for each is distinct.  
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19 The GMA authorizes the Board to make rulings concerning invalidity in four situations:<sup>15</sup>  
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- 21 1. "In the final order," the Board may enter a determination of invalidity where there  
22 has been a finding of noncompliance and a determination of substantial interference  
23 with GMA goals if the ordinance is allowed to stand;<sup>16</sup>  
24 2. Upon a motion by a city or county subject to a determination of invalidity,  
25 requesting the board "clarify, modify or rescind" the order, the board "shall  
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29 <sup>12</sup> See *WHIP v City of Covington*, CPSGMHB Case No. 00-3-0012, Order on Motions (Nov. 6, 2000)  
30 (explaining that the GMA goals at issue included all the goals for coordinated urban planning and  
31 infrastructure, not merely the goal of citizen participation.)

<sup>13</sup> Declaration of Andrew Lane, Exhibit A

<sup>14</sup> Court Order, at 2

<sup>15</sup> The GMA terminology includes make, modify, clarify, rescind, or reconsider when speaking to invalidity.

<sup>16</sup> RCW 36.70A.302(1)

1 expeditiously schedule a hearing ... [and] issue any supplemental order based on the  
2 information provided at the hearing” within thirty days;<sup>17</sup>

3 3. Upon legislative action by a city or county subject to a determination of invalidity,  
4 “after a compliance hearing, the board shall modify or rescind the determination of  
5 invalidity” if the board concludes the plan or regulation no longer substantially  
6 interferes with the GMA goals;<sup>18</sup> and

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8 4. In a compliance hearing upon petition of a party, the board shall “decide, if no  
9 determination of invalidity has been made, whether one now should be made under  
10 RCW 36.70A.302.”<sup>19</sup>

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12 Thus, the only statutory avenue by which Petitioners can request the Board to address  
13 invalidity again, is upon petition in a compliance hearing under RCW 36.70A.330(4). The  
14 Petitioners’ motion does not provide the Board with any statutory authority by which it can  
15 reconsider its previously issued denial of invalidity outside of these parameters.

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17 Generally, when the Board issues a final decision and that decision is appealed, the Board  
18 no longer retains jurisdiction over the appealed issue, except for compliance actions where  
19 no stay has been issued.<sup>20</sup> Petitioners’ motion cites no authority for an exception for  
20 changed circumstances or new information. Petitioners’ reply cites to two Western Board  
21 decisions where the board made express provision for the petitioners in those cases to  
22 bring a subsequent motion for invalidity upon a showing of changed circumstances.<sup>21</sup> In  
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27 <sup>17</sup> RCW 36.70A.302(6), .330(1)(both require a hearing)

28 <sup>18</sup> RCW 36.70A.302(7)(requires a hearing; the city or county bears the burden of demonstrating that invalidity  
should no longer be imposed – RCW 36.70A.320(4))

29 <sup>19</sup> RCW 36.70A.330(4)(requires a hearing)

30 <sup>20</sup> *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030, Order on Wells’ June 4, 1998 Motion for  
Reconsideration (July 2, 1998).

31 <sup>21</sup> *Advocates for Responsible Development v. Mason County*, WWGMHB 06-2-0005, Order Finding  
Noncompliance of Development Regulations to Protect Against Incompatible Development (May 14, 2007), at  
32 9-10; *Abenroth v. Skagit County*, WWGMHB 97-2-0060c/07-2-0002, Compliance Order – Bayview Ridge  
Urban Growth Area/Final Decision and Order (Aug. 6, 2007), at 65.

1 neither of those cases, however, was there reference to a court challenge pending, much  
2 less a court-ordered stay.

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4 Petitioners reference the recent Court of Appeals' decisions in *Clallam County v Dry Creek*  
5 *Coalition*, 116 Wn.App. 366 (2011) and *Karpinski v Clark County*, 161 Wn.App. 204 (2011),  
6 where the Court of Appeals advocates lengthy stays of compliance by the Growth Board,  
7 together with prohibitions on continuing development by counties and cities "to preserve the  
8 record and issues for review."<sup>22</sup> These cases highlight the problem of non-compliant  
9 development vesting during the protracted period of an appeal to the courts, but the Growth  
10 Board is not granted any new authority to revisit a final order and impose invalidity to halt  
11 such vesting. If anything, the Board reads the *Clallam County* and *Karpinski* opinions as  
12 underscoring that the Board lacks jurisdiction to modify an order on appeal before the court,  
13 except as required in compliance proceedings.  
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16 Further, in light of the conflicting interpretations by the parties, the Board finds the reach of  
17 the April 8 and June 14 superior court stays unclear. The Petitioners' motion does not  
18 provide the Board with any authorization from the superior court to conduct a compliance  
19 hearing within the contemplation of RCW 36.70A.330(4). If such an authorization was  
20 obtained, the Board could schedule a compliance hearing to consider the invalidity request.  
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### 22 **III. ORDER**

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24 Having reviewed the Petitioners' Motion for Order of Invalidity Based on New Information,  
25 the responsive briefs of the City and YarrowBay, Petitioners' reply, and the facts and law  
26 presented, the Board determines that, absent judicial clarification of the Board's authority,  
27 the Board is unable to take action on Petitioners' motion.  
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<sup>22</sup> *Clallam County*, at 12.

1 On the facts of this particular case, Petitioner's Motion for Order of Invalidity may be refiled if  
2 the Petitioner obtains authorization from the Superior Court or if the Superior Court  
3 otherwise clarifies the scope of the Order Granting Stay of Compliance Schedule (April 8,  
4 2011) and Order Granting Motion to Stay (entered June 14, 2011) so as to allow a  
5 compliance hearing pursuant to RCW 36.70A.330(4).  
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7 SO ORDERED this 20th day of June, 2011.  
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Margaret A. Pageler, Board Member

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Raymond L. Paolella, Board Member  
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